

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
NO. 22036

WALTER F. KEYS, )  
 )  
Petitioner and Appellant, )  
 )  
v. )  
 )  
WALTER DUNBAR, et al., )  
 )  
Respondents and Appellees. )  
 )  
\_\_\_\_\_ )

APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA

\_\_\_\_\_  
APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
WILLIAM E. JAMES,  
Assistant Attorney General  
ANDREA SHERIDAN ORDIN,  
Deputy Attorney General  
Attorneys for Appellee

FILED

DEC 14 1967

WALTER F. KEYS

0562-27



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## Constitutional

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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's Petition for Writ of Habeas Corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in a court of appeals, when a Certificate of Probable Cause has been issued. It should be noted that the transcript of this proceeding reflects the fact that no Certificate of Probable Cause has been issued. On July 7, 1967, it was

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

WALTER F. BRYAN,

Plaintiff,

vs.

WILLIAM C. BRYAN,

Defendant.

COMES NOW

the Plaintiff, Walter F. Bryan,

and moves the Court for an order directing the

Defendant, William C. Bryan, to pay to the Plaintiff the

sum of \$100.00, with interest thereon from the date of

the filing of this motion until the same is paid.

The Plaintiff alleges that the Defendant has

received from the Plaintiff the sum of \$100.00, and

has refused to pay the same back to the Plaintiff.

It is the Plaintiff's contention that the Defendant

is indebted to the Plaintiff for the sum of \$100.00.

Wherefore the Plaintiff prays that the Court will



ordered that appellant's Application for Leave to Appeal be denied, and it was further certified that it appeared to the Court that the appeal was frivolous and not taken in good faith. (Tr. of Rec. pp. 220-21.)

## STATEMENT OF THE CASE

### A. Proceedings of the State Courts

In an information filed by the District Attorney of Los Angeles County, the appellant was charged in Counts I and II with the crimes of abortion committed upon Marcell Allen on December 10, 1958, and January 17, 1959, and in Count III, with the crime of abortion committed upon Laurie N. Scott, on March 12, 1959. (Cl. Tr. pp. 1-3.) Appellant pleaded "Not Guilty." (Cl. Tr. p. 6.) Appellant and all counsel waived trial by jury, and it was stipulated that the case be submitted on the testimony taken at the preliminary hearing, with such additional evidence as counsel desired to present. (Cl. Tr. p. 7.) The Court found the appellant guilty on each count. (Cl. Tr. p. 11.) Appellant was sentenced to a state prison for the term prescribed by law on each count, the sentence as to each count to run concurrently with each other. (Cl. Tr. p. 13.)<sup>1/</sup>

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1. References are to the Clerk's Transcript in the state trial court, a copy of which, although not made a part of this record, was before the trial judge at the time of the Memorandum Opinion and Order of April 17, 1964. (Tr. of Rec. pp. 143, 72.)

...that appellant's application for leave to  
appear is denied, and it was further certified that it  
appeared to the Court that the appellant was fit and sound  
and was not in good health. (Ex. 1, pp. 11-12.)

## STATEMENT OF THE CASE

### A. Proceedings in the State Court

An information filed by the District  
Attorney of Los Angeles County, the appellant was  
arrested in County I and II with the offense of abduction  
committed upon several girls in December 19, 1939, and  
January 11, 1940, and in County III, with the crime of  
abduction committed upon Lucile H. Hunt, on March 12,  
1940. (Ex. 1, pp. 1-3.) Appellant pleaded "Not Guilty."  
(Ex. 1, p. 4.) Appellant was arraigned and trial  
by jury, and it was determined that the case be subse-  
quently on the testimony taken at the preliminary hearing,  
with such additional evidence as would be desired to  
present. (Ex. 1, p. 5.) The Court found the appellant  
guilty on each count. (Ex. 1, p. 6.) Appellant was  
sentenced to a term of years for the first count and  
for the second count, the sentence to be served in the  
penitentiary with each count. (Ex. 1, p. 7.)

1. Reference is to the State's testimony in the  
above trial court, and it is noted that the trial judge at the  
time of the appellant's conviction and sentence in April 1940.  
(Ex. 1, pp. 11, 12.)



The judgment of the trial court was affirmed on December 8, 1960, and reported at 187 Cal. App. 2d 246; 9 Cal. Rptr. 537. Subsequent to that time appellant submitted to the various State courts a series of writs of mandate, writs of habeas corpus, and various other petitions between March 15, 1961, to June 17, 1963. (Tr. of Rec. pp. 4-5.)

B. Proceedings in Federal Courts

On October 30, 1963, appellant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of California, Central Division. The Petition was denied on March 10, 1964, by an order subsequently vacated. (Tr. of Rec. p. 69.) On April 17, 1964, the court ordered that the Petition for Writ of Habeas Corpus be denied. (Tr. of Rec. pp. 72-73.) The opinion appears at 229 F. Supp. 703 (1964).

On June 11, 1964, appellant filed his Application for Notice of Appeal and Application for Certificate of Probable Cause to Appeal and Motion for Leave to Appeal in forma pauperis. (Tr. of Rec. p. 74.) On June 24, 1964, it was ordered that the Application for Leave to Appeal in forma pauperis be denied. It was further ordered that it appearing from the record that there was no substantial ground on which to base an appeal, the Application for Certificate of Probable Cause be denied. (Tr. of Rec. pp. 86-87.)

The defendant is the same person who was arrested  
on January 2, 1960, and removed to the U.S. Penitentiary  
at Alcatraz, California. The defendant is the same  
person who was arrested on the same date and removed  
to the U.S. Penitentiary at Alcatraz, California.  
The defendant is the same person who was arrested  
on the same date and removed to the U.S. Penitentiary  
at Alcatraz, California.

#### Defendant's Statement

The defendant is the same person who was arrested  
on the same date and removed to the U.S. Penitentiary  
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The defendant is the same person who was arrested  
on the same date and removed to the U.S. Penitentiary  
at Alcatraz, California.



Appellant filed a Petition to Set Aside and Vacate previous Order on Denial for a Writ of Habeas Corpus and a Motion for Rehearing. (Tr. of Rec. p. 88.) On February 5, 1965, the court having duly considered the motion, it was ordered that the motion be denied. (Tr. of Rec. p. 94.)

On February 8, 1966, appellant filed a Notice for a hearing on his motions (Tr. of Rec. p. 95) to vacate and set aside previous order on denial for a Writ of Habeas Corpus; for rehearing on Petition for Writ of Habeas Corpus; to add Department of Parole as respondent. On February 21, 1966, the above motions and appellant's Motion for Leave to Appeal in forma pauperis and for Certificate of Probable Cause were heard. It was ordered that the motions be denied. (Tr. of Rec. p. 122.)

On March 8, 1966, the court filed its order that petitioner's Motion to Set Aside and Vacate the court's Order of April 17, 1964, and Motion for Rehearing and Motion for Certificate of Probable Cause be denied. (Tr. of Rec. p. 120.)

On December 20, 1966, appellant filed a Motion for Rehearing on Denial for Writ of Habeas Corpus and a Motion to Vacate and Set Aside previous Order on Denial of Writ of Habeas Corpus. (Tr. of Rec. p. 124.) On January 9, 1967, at the hearing of the motion of

Agreement of the 1st of January 1900

Yours very truly, J. H. P. [Signature]

Copy of the 1st of January 1900

On January 1st, 1900, the following was received:

The result of the election was as follows:

(The 1st of January 1900)

In January 1900, the following was received:

For the purpose of the election, the following was received:

Yours very truly, J. H. P. [Signature]

Copy of the 1st of January 1900

On January 1st, 1900, the following was received:

The result of the election was as follows:

For the purpose of the election, the following was received:

Yours very truly, J. H. P. [Signature]

Copy of the 1st of January 1900

(The 1st of January 1900)

In January 1900, the following was received:

For the purpose of the election, the following was received:

Yours very truly, J. H. P. [Signature]

Copy of the 1st of January 1900

(The 1st of January 1900)

In January 1900, the following was received:

For the purpose of the election, the following was received:

Yours very truly, J. H. P. [Signature]

Copy of the 1st of January 1900

On January 1st, 1900, the following was received:



petitioner for rehearing and to vacate and set aside the order, petitioner's motion was denied, subject to the court's reading of supplemental points and authorities. The court ordered that if there were anything in the memoranda which altered the court's view the court would make a further order. (Tr. of Rec. p. 162.)

On January 26, 1967, the court having permitted petitioner to file additional Points and Authorities and having reviewed such Points and Authorities, ordered that the Order of January 9, 1967, would remain in full force and effect. (Tr. of Rec. p. 161.)

On July 6, 1967, a certified copy of a Certificate of Discharge and Release of appellant from custody and confinement was filed in the United States District Court. (Tr. on Appeal, pp. 217-18.) On July 7, 1967, it was ordered that appellant's Application for Leave to Appeal in forma pauperis was denied, and it was further certified that it appeared to the trial court from the record in this case that appellant's appeal was frivolous and not taken in good faith. (Tr. of Rec. pp. 220-21.)

#### STATEMENT OF FACTS

The statement of the facts is sufficiently set forth in the State court opinion, People v. Keys, 187 Cal. App. 2d 246, 247-48; 9 Cal. Rptr. 337.





## APPELLANT'S CONTENTIONS

Appellant asserts the following errors:

1. Incompetency, negligence and ineffective or lack of trial counsel in violation of Fifth, Sixth and Fourteenth Amendment of the United States Constitution.

2. Incompetency, negligence and ineffective or lack of counsel before sentence and on appeal in violation of Fifth, Sixth, Seventh and Fourteenth Amendments of the United States Constitution.

3. Conspiracy on the part of trial attorney in allowing this conviction, resulting in denial of a fair and impartial trial under Articles 5 and 6 of the Constitution of the United States.

4. Use of perjured testimony to secure a conviction, in violation of Due Process Clause of Fourteenth Amendment.

5. Denial of hearing of appellant's Petition for a Writ of Habeas Corpus in violation of Fifth, Ninth and Fourteenth Amendment of the United States Constitution.

6. Defective indictment or information in violation of the United States Constitution of the Fourteenth Amendment.

7. Defective sentence in violation of the United States Constitution Amendment Fourteen, and

Applicant waives the following rights:

1. Indemnification, reimbursement and expenses

in case of trial counsel is violation of 18 U.S.C. 3501

and Government's interest of the United States

Continued.

2. Indemnification, reimbursement and expenses

in case of counsel before sentence and on appeal in

violation of 18 U.S.C. 3501, 3502 and 3503

Applicant waives the following rights:

3. Counsel on the part of trial attorney

in violation of this conviction, resulting in denial of a

fair and impartial trial under Articles 2 and 3 of the

Constitution of the United States.

4. Use of military personnel to assist in

conviction in violation of 18 U.S.C. 3501

Continued.

5. Waiver of right of appeal in violation

of a right of appeal given in violation of 18 U.S.C. 3501

and Government's interest of the United States

That

6. Waiver of right of appeal in violation of

violation of the United States Constitution of the

Continued.

7. Waiver of right of appeal in violation of the

United States Constitution in violation of 18 U.S.C. 3501

section 654 of the California Penal Code.

8. Failure of court to conduct a full evidentiary hearing to establish the existence of the facts set forth in the allegations in the Petition.

## ARGUMENT

### I

#### THIS COURT HAS NO POWER TO HEAR APPELLANT'S APPEAL

Appellant was released from custody on February 23, 1966. He is no longer under any restriction, constructive or otherwise. All issues raised by petitioner in his Application for Writ of Habeas Corpus are now moot. Parker v. Ellis, 362 U.S. 574, 575-76. In Bonnie v. Gladden, 377 F. 2d 555 (9th Cir. 1967), the appellant similarly completed his sentence and was discharged from confinement without condition or restriction. This Court stated:

"In light of this development we are without power to deal with the merits of Bonnie's claim under the interpretation of the 'in custody' requirement of 28 U.S.C. § 2241(c) (1) (1964) adopted in Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed. 2d 963 (1963).

"The case must therefore be remanded to the district court with instructions to vacate the







order appealed from and dismiss the application for habeas corpus."

Respondent concludes that the same result must apply here.

## II

### ALL OTHER CONTENTIONS RAISED BY APPELLANT ARE WITHOUT MERIT

It is appellee's contention that all allegations of error raised by appellant have been rendered moot. In light of that contention, appellee will not discuss appellant's allegations in detail. For the most part, it appears that appellant's allegations have been answered in prior pleadings which have been made a part of the record. If the Court wishes any further detail than the following references to already prepared responses, appellee will be pleased to prepare additional responses.

#### A. Appellant Was Adequately Represented by Counsel at the Time of His Trial in the California State Court

Appellant alleges that his counsel was inadequate, and specifies certain specific failures of his counsel. (App. Op. Br. pp. 11-12.) Said contention, although not raised in his appeal in a state court, has been raised several times by appellant and has been answered in appellee's response and by the Opinions of the Court. (Tr. of Rec. pp. 13-16, 71-73, 64-68.)



B. Appellant Was Adequately Represented  
by Counsel at Time of Appeal

Appellant alleges that he was inadequately represented at the time of the appeal and specifies certain specific "irregularities" which he alleges support his claim. (App. Op. Br. pp. 15-16.)

It appears from the record that appellant has not exhausted his state remedies as to this allegation of error. 28 U.S.C. 2254. It further appears that he has not raised this contention in any prior pleadings in the Federal courts. In any event, he has not alleged any fact which would show his representation at time of appeal was inadequate, nor that he was deprived of the constitutional requirement of "substantial equality and fair process." Anders v. California, 386 U.S. 738, 744; People v. Ibarra, 60 Cal. 2d 460, 464; 34 Cal. Rptr. 863.

C. Appellant's Allegation That His  
Conviction Was Eased in Part Upon  
Perjured Testimony is Not Supported  
by the Record

Appellant alleges on page 18 of Appellant's Opening Brief that his conviction was secured by "use of perjured testimony," in violation of the Due Process Clause of the Fourteenth Amendment. Appellant states no facts at this point in his Opening Brief to support such a contention. If, in fact, appellant is referring to the fact that in one of appellee's responses an







affidavit referred to by appellee was not attached (App. Op. Br. pp. 21-22), said matter has been briefed by appellee. (Tr. of Rec. pp. 140-41.) The District Court, after considering written and oral argument on this point as well as others, denied the petitioner's motion. (Tr. of Rec. pp. 162, 161.)

D. Appellant's Allegation that the Information Which Charged Him Was Defective is Without Merit

Appellant alleges that the information charging him with abortion was defective. (App. Op. Br. p. 23.) It does not appear that appellant has ever raised this contention before, either in a State court or in the proceedings of record in the United States District Court. Therefore, appellant has not exhausted his state remedies on this issue. 28 U.S.C. 2254.

In any event, appellant mistakes the purpose of California's accusatory pleading. The only purpose of the information is to give notice to the defendant of the crime of which he is charged. No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits. Penal Code section 960; People v. Massey, 151 Cal. App. 2d 623, 312 P.2d 365; People v. McCurdy, 165 Cal. App. 2d 592, 332 P.2d 350.



E. Appellant's Claim That He Was  
Sentenced in Violation of Penal  
Code Section 654 is Without Merit

Appellant claims he was sentenced in violation of Penal Code section 654. (App. Op. Br. p. 27.)

Again, appellant did not raise his contention in a State court and therefore has not exhausted his State remedies. 28 U.S.C. 2254. The merits of his contention have been fully discussed in appellee's Supplemental Points and Authorities. (Tr. of Rec. pp. 155-159.)

F. Appellant Has Alleged No Facts  
Which Would Justify the Necessity  
for an Evidentiary Hearing

Appellant alleges that he was denied a right to an evidentiary hearing. (App. Op. Br. p. 31.) As contended by appellee in the District Court and as held by the District Court, appellant did not raise any issue of fact which would warrant an evidentiary hearing. (Tr. of Rec. pp. 72, 16.) Furthermore, it should be noted that appellant has personally appeared before the United States District Court on two separate occasions and was permitted to argue and present any relevant evidentiary material available. (Tr. of Rec. pp. 122, 162.)

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Exhibit 101 - Page 10  
Continued from Page 9

Applicant claims that the information is accurate

of the fact that the information is accurate

Applicant claims that the information is accurate

The State court and the court have not

State records. 10/10/10. The court has

confirmed that the information is accurate

Applicant claims that the information is accurate

10/10/10

Exhibit 101 - Page 11  
Continued from Page 10

Applicant claims that the information is accurate

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## CONCLUSION

For the foregoing reasons it is respectfully requested that the judgment of the District Court be affirmed.

THOMAS C. LYNCH, Attorney General  
WILLIAM E. JAMES,  
Assistant Attorney General  
ANDREA SHERIDAN ORDIN,  
Deputy Attorney General

Attorneys for Appellee

AO:njc  
21 CR LA  
67-1548  
12-12-67





## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 19 and 18 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ANDREA SHERIDAN ORDIN

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ANDREA SHERIDAN ORDIN

